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Office of Administrative Law Judges
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Issue Date: 22 December 2004

CASE NO: 2003-LHC-02530
2004-LHC-01301

OWCP NO: 18-068214
18-082617

In the Matter of:

DEANNA O'NEILL
Claimant,
v.

LONG BEACH CONTAINER TERMINAL and SIGNAL MUTUAL INDEMNITY ASSOCIATION,
Employer and Carrier,
v.

CENTENNIAL STEVEDORING SERVICES and HOMEPORT INSURANCE COMPANY,
Employer and Carrier.

Appearances:

Charles D. Naylor, Esq.
For Claimant

Lisa M. Conner, Esq.
For Long Beach Container Terminal and Signal Mutual Indemnity Association

William N. Brooks II, Esq.
For Centennial Stevedoring Services and Homeport Insurance Company

Before: Gerald M. Etchingham
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from claim filed by Deanna O'Neill under the Longshore and Harbor Worker's Compensation Act (the "Act"), as amended, 33 U.S.C. 901 *et seq*. The two

employers in the case are Long Beach Container Terminal ("LB") and Centennial Stevedoring Services ("CSS").

STIPULATIONS:

The parties stipulated to the following:

1) Claimant suffered a wrist injury on May 19, 1998 that arose out of and in the course of her employment with employer LB. TR at 19.[1]
2) An employee-employer relationship existed between Claimant and LB at the time of the accident. *Id.*
3) This matter is within the jurisdiction of the Act. *Id.*
4) The claims were timely noticed and filed. *Id.*
5) Claimant's average weekly wage at the time of the May 19, 1998 injury was $1,205.75. TR at 20.
6) Claimant's average weekly wage as of July 25, 2001 was $1,330.04. TR at 21.
7) Claimant's initial period of temporary total disability lasted from May 20, 1998 to September 1, 1998. TR at 21-2.
8) LB agreed to pay an outstanding bill from Dr. Kramas in the amount of $1,316.76 for medical services she provided to Claimant. TR at 25.
9) Claimant withdrew her claims for all other bodily injuries except the carpal tunnel syndrome in her left wrist. ALJX 2 - Claimant post-hearing brief at 1.

ISSUES

1) Which employer is responsible for the period of temporary total disability following Claimant's July 27, 2001 surgery?
2) What is the proper duration for temporary total disability following the July 27, 2001 surgery?
3) What is the date of maximum medical improvement (MMI)?
4) Is Claimant entitled to any permanent partial disability?
5) Is the responsible employer required to pay for treatments and surgery conducted or recommended by Dr. David Slutsky?

SUMMARY OF DECISION

As a result of her work at CSS from July 23, 2001 through July 25, 2001, Claimant sustained a cumulative trauma injury ("the 2001 injury") which aggravated her pre-existing left-wrist condition. Because Claimant did not sustain any subsequent, work-related, aggravating injury, CSS is the last responsible employer and is liable for Claimant's compensation and medical benefits beginning July 26, 2001. Claimant was temporarily totally disabled from July 26, 2001 and continuing through May 23, 2002.

[1] The following abbreviations will be used: TR = transcript of May 25, 2004 hearing; CX = Claimants exhibit; LBX = Long Beach Container Terminal's exhibit; CSSX = Centennial Stevedoring Services exhibit; ALJX = Administrative Law Judge Gerald Etchingham's exhibits.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Procedural Background

On January 13, 2004, an order was issued by Administrative Law Judge William Dorsey joining Centennial Stevedoring Company, Inc. and its insurance carrier, Homeport Insurance Company. The order also continued the hearing previously set for February 23, 2004, in Long Beach California to the next available trial setting for Long Beach cases.

On January 22, 2004, I issued the pre-trial orders in this matter and a calendar call hearing was set for May 24, 2004 to take place in Long Beach, California.

A formal hearing was held in Long Beach, California, on May 25, 2004, at which time all parties were given a full opportunity to present evidence and argument as provided by law and regulation. The record consists of the transcript of the hearing ("TR"); Claimant's exhibits ("CX") numbers 1 through 20; employer LB's exhibits ("LBX") numbers 1 through 28; employer CSS's exhibits ("CSSX") numbers 1 through 7 and numbers 9 through 22 and Administrative Law Judge's Exhibit ("ALJX") 1-4, consisting of the notice of hearing and three closing briefs of Claimant and both Employers, respectively, filed August 26, 2004, thereby closing the record. CSSX 8 was not admitted into evidence having been denied for reasons referenced in the record. TR at 9-13, 352-53.

Factual Background

Claimant is a married thirty-eight year old mother of five children. TR at 37-38. Claimant began working longshore type work as an identified casual around 1995. TR at 40. She obtained her class B Registration on or about August 10, 1997. TR at 40. Claimant's left wrist never bothered her prior to her May 19, 1998 accident. TR at 41.

On May 19, 1998 Claimant worked at a swing job at employer LB. TR at 44. More specifically, she was working as a catch-up lasher and helping to secure shipping containers to the deck. TR at 44-45. Claimant fell a couple of feet while attempting to lift a three-high steel lashing bar. TR at 46. Claimant injured her knees, neck and left wrist and arm. TR at 48-49. For purposes of this decision and order, I am only concerned with her left wrist injury. *See Stipulation No. 9.*

On the same day as the accident, Claimant saw Dr. Kromas, a chiropractor who noted that Claimant's left hand was bruised and her left wrist painful and swollen. *Id.*; CX 13 at 218. Dr. Kromas tested the Claimant's grip strength using a dynamometer and found Claimant's right hand tested three times at 60 lbs. whereas her left hand tested twice at 5 lbs. and once without a reading. CX 13 at 218. Dr. Kromas immediately referred Claimant to Dr. Delman, an orthopedic surgeon. TR at 50; CX 13 at 227. Dr Kromas continued seeing Claimant and performed physical therapy on her until September 27, 1999. CX 14 373-6

Dr. Delman has a private practice specializing in orthopedic and spine surgery, was an instructor in orthopedic and spine surgery for twelve years at the Los Angeles unit of Shriners Hospital for Crippled Children, was appointed staff surgeon at three Southern California Hospitals, and has served as a consultant in spine surgery with Southern California Permanente Medical Group. CX 17 at 633. Dr. Delman examined Claimant's wrist the same day as the accident and took x rays. TR at 50; CX 15 at 387. He reported the following:

> There is decreased left wrist motion. There is some bruising in the left thenar region. There is pain with left thumb range of motion and decreased thumb motion. There is tenderness over the thenar region. There is some tenderness in the snuff box. There is decreased grip strength. Tinsels is negative over carpal tunnel. Phalen's was not tested. There is no thenar atrophy or intrinsic wasting. There is no crepitus with range of motion.

CX 15 at 388.

Dr. Delman reviewed the x rays and found "no definite fracture or dislocation." CX 15 at 388. He diagnosed a "contusion and sprain, left wrist and thumb." CX 15 at 389. He immobilized claimant's left wrist and thumb with a "thumb spica splint." CX 15 at 389; LBX 28 at 57. He anticipated removing the splint in ten days and reexamining her wrist at that time for a possible occult fracture. CX 15 at 389. Claimant was also provided with pain medication. TR at 50. Dr. Delman placed Claimant on temporary total disability for ten days. LBX 4 at 5. During this examination Claimant failed to notify Dr. Delman that she was an on and off smoker for twenty two years. LBX 28 at 10.

On May 29, 1998 Claimant returned to Dr. Delman for a follow up examination. CX 15 at 418; TR at 51. The splint was removed and her wrist was X rayed. TR at 51. Again, there was no definite fracture indicated on the X rays. CX 15 at 418. Claimant complained of the following: wrist pain and hand numbness; thumb, index and middle finger get numb frequently; wrist and thumb are "sore and achy." CX 15 at 418. Claimant also tested positive on two tests typically used to detect the presence of nerve irritation or entrapment - Tinsels and Phalens. CX 19 at 15. The numbness and a "positive Tinel's and positive Phalen's in the left wrist" were new symptoms since the initial examination. LBX 28 at 15; CX 15 at 418. Dr. Delmon saw these new symptoms as suggestive of irritation of the nerve or an entrapment situation such as carpal tunnel syndrome. LBX 28 at 15. Dr. Delman diagnosed her with a left wrist "[s]prain, left wrist and carpal tunnel syndrome." CX 15 at 418. He believed that the diagnosis related back to the May 19, 1998 industrial incident at Long Beach Container Terminal. LBX 10 at 21.

On June 4, 1998, Claimant was examined by Dr. James T. London on request of employer Long Beach Container Terminal and its insurance carrier. LBX 7 at 25. Dr. London is currently a staff orthopedic surgeon at three hospitals, has held various fellowships including a hand surgery fellowship, has been published many times in various journals and books. CX 17. His report dated June 10, 1998, indicated that Claimant complained to him of the following symptoms related to his her left wrist:

1) Constant aching pain in her left palm and the dorsal aspect of her left distal forearm. She is using a left wrist splint at the present time;
2) Constant weakness and numbness in the left thumb, index, and long fingers of her hand; and
3) Constant tenderness over the radial aspect of the left wrist.

LBX 7 at 26.

Dr. London's examination revealed no heat, swelling or ecchymosis[2] and noted that sensation was intact other than some decreased sensation along the median nerve distribution of Claimant left wrist. LBX 7 at 28. At that time he recommended further treatment and that Claimant remain on temporary total disability for about three weeks. LBX 7 at 29.

Claimant saw Dr. Delman again on June 10, 1998 and June 25, 1998. LBX 28 at 15. The doctor's notes indicate that claimant was still complaining of tingling in her fingers. CX 15 at 412. He again noted that she tested positive on both the Tinsel's and Phalen's. *Id*. Dr. Delman was uncertain if the symptoms resulted from nuerapraxia or carpal tunnel[3]. *Id*. He gave her a steroid injection and determined that if the steroid injection did not work, that he would order an EMG and a nerve conduction study. *Id*. Dr. Delman referred her to physical therapy. CX 19 at 17.

Dr. Delman examined Claimant again on July 9, 1998 and subsequently requested that Claimant undergo an EMG and nerve conduction study, later performed by Dr. Gluckman on July 31, 1998. *See* LBX 11; LBX 28 at 18. The tests were negative as to the existence of carpal tunnel syndrome. LBX 28 at 18. However, due to the Claimant's continuing complaints, Dr. Delman did not change his initial diagnosis of contusion and sprain of Claimant's left wrist and thumb in response to the tests. LBX 28 at 18.

Dr. Delman examined Claimant again on or around August 10, 1998. Dr. Delman's August 25, 1998 report indicates that Claimant had undergone some acupuncture and that her numbness was nearly gone. LBX 28 at 20. Dr. Delman concluded that Claimant could return to work starting September 2, 1998, without restrictions. TR at 54; LBX 28 at 21.

Dr. London re-examined Claimant on September 25, 1998. LBX 7 at 30. Dr. London related that Claimant complained of "intermittent" pain and weakness as opposed to "constant" pain and weakness as described in his June 4, 1998 report. LBX 7 at 26, 31. Additionally, the pain and weakness is described as affecting her "left wrist and hand" as opposed to her "left thumb, index and long fingers." LBX 7 at 26, 31. The report describing the September 25th exam states "[s]he is taking primarily driving jobs. Since returning to work, she has had some increased numbness and weakness in her left hand." LBX 7 at 30. Dr. London administered grip strength tests and Claimant's left wrist tested at 5 pounds each three times. TR at 97. He noted that he would have expected some atrophy in her left arm and forearm circumferences if Claimant's left hand grip strength remained low over a long period of time. LBX 7 at 32.

[2] Ecchymosis is defined as "a small hemorrhagic spot . . . in the skin or mucous membrane forming a nonelevated, rounded or irregular, blue or purplish patch." Dorland's Illustrated Medical Dictionary, 29th Edition published by W.B. Saunders Co. (2000).

[3] Nuerapraxia is a contusion or stretch injury to the nerve that does not disrupt the axions. CX 19 at 17.

Claimant had no atrophy which led him to suspect that Claimant may not have been putting forth her full effort on the left hand grip strength tests. LBX 7 at 30. Dr. London opined that Claimant was permanent and stationary as of September 29, 1998. LBX 7 at 33.

Dr. London again examined Claimant on January 8, 1999. LBX 7 at 34. He related that Claimant "continues to complain of numbness in the thumb, index and long fingers of her left hand." LBX 7 at 37. Claimant complained that her left wrist was weak and that her left thumb, index and long fingers were constantly numb but felt better when she moved her hand. LBX 7 at 35. The doctor found positive Phalen's and Tinel's indicators over the median nerve of the left wrist and recommended further EMG and nerve conductive tests in six months if symptoms persisted. LBX 7 at 37.

Beginning February 1, 1999, Claimant began to change her job activities because she was elevated to Class A status, enabling her to choose different job categories. TR at 55-56. From September 1998 to February 1999, Claimant did mostly driving jobs; thereafter, she did mostly swing work up to the time of her surgery on July 27, 2001. TR at 55, 57, and 73: CX 1 at 36-48.

Claimant testified unconvincingly that in all her work activities from September 2, 1998 through July 25, 2001, she protected her left hand by rarely using it, even in jobs that would normally require two-handed operation. TR at 57-60; 342. On July 13, 1999, Claimant performed the first of numerous lasher jobs since returning to work on September 2, 1998. CX 1 at 41-48.

Dr. Delman examined Claimant again on October 7, 1999 and October 28, 1999. LBX 28 at 22; LBX 28 at 28. During the October 7, 1999 exam, Claimant first complained that her left hand felt cold and that it looked to her to be a different size from her right hand. LBX 28 at 28. Dr. Delman's diagnosis at this time was carpal tunnel syndrome or possibly "double crush." LBX 28 at 60. He later concluded that Claimant was unlikely to have "double crush." LBX 28 at 60.

Following the October 28, 1999 examination, Dr. Delman referred Claimant to Dr. Mehta for a repeat EMG and nerve conduction test. LBX 28 at 25. The tests were conducted on November 18, 1999, and did not indicate carpal tunnel syndrome. LBX 28 at 25. Dr. Mehta indicated that Claimant told him her symptoms had increased over time and were worse at night. LBX 10 at 73; LBX 28 at 27.

On February 16, 2000, Dr. London reexamined Claimant and issued his finding in a report dated February 21, 2000. LBX 7 at 38. In the report, he related that Claimant's "symptoms have not changed since she was last evaluated here." LBX 7 at 38. Again, Claimant noted weakness in her left hand and described the "constant" numbness in her left thumb, index and long fingers. LBX 7 at 38. He also commented on her grip strength and that her left hand registered 5 pounds of pressure whereas her right dominant arm was capable of exerting about 85 pounds of pressure. Dr. London noted "no thenar, hypothenar or intrinsic muscle atrophy or weakness." LBX 7 at 39. Dr. Lombard found no Tinel's sign over the median and ulnar nerves at Claimant's wrists but noted that the Phalen's maneuver caused a tingling sensation in the median nerve distribution of Claimant's left hand. *Id*

Dr. London stated in his report that "[i]n my opinion she completely and fully recovered without any permanent residuals from the 5/19/98 accident. Her subjective symptoms and her grip, in my opinion, cannot be substantiated on any objective orthopedic basis." LBX 7 at 40. Dr. London further stated that Claimant "has undergone an additional electrodiagnostic test on her left upper extremity that shows no evidence of any pathology that would explain her ongoing symptoms or her alleged grip loss." *Id*.

Dr. Delman examined Claimant on April 28, 2000, and he issued a report detailing his findings on October 18, 2000. CX 19 at 32. He found her condition to be permanent and stationary as of April 28, 2000, because her symptoms had "pretty much plateaued." *Id.* at 33. He diagnosed her as suffering from entrapment neuropathy, probable carpal tunnel syndrome, but in the absence of confirmation through the two EMG nerve conduction tests or MRIs did not allow him to confirm his diagnosis. *Id.*

Dr. Kromas subsequently referred Claimant to Dr. David Slutsky and on February 8, 2001, Dr. Slutsky examined Claimant and performed an EMG and nerve conductive study. CLX 16 at 601; LBX 28 at 37. Dr. Slutsky is an orthopedist who spent a year in a hand and microsurgical fellowship at Loma Linda University Medical Center. CX 20 at 9. He typically performs between 30 and 50 carpal tunnel releases a year. *Id.* at 10.

Dr. Slutsky performed an EMG and nerve conduction study which revealed "carpal tunnel syndrome of mild severity" in contrast to the earlier tests which were negative for indications of carpal tunnel compression or irritation of the nerve.[4] LBX28 at 38; CX 20 at 49-50. Dr. Slutsky was concerned about the apparent disconnect between Claimant's complaints of severe carpal tunnel syndrome, and the EMG and nerve conduction studies indicated carpal tunnel of "mild severity." CLX 20 at 32-33. Dr. Slutsky referred Claimant to a neurologist, Dr. Ronald D. Farran, to rule out the possibility that Claimant's complaints stemmed from a neurological problem. CLX 20 at 33.

Claimant was examined by Dr. Farran on February 13, 2001. Dr. Farran ruled out the possibility that a neurological disorder was the cause of Claimant's complaints. CX 16 at 597-600.

Dr. Slutsky recommended carpal tunnel release surgery due to the results of most recent EMG, nerve conduction study, the persistence of Claimant's complaints and the results of his examination as follows:

> She had reproducible clinical signs on five occasions before I did the surgery… She has positive Tinel's on many of the occasions, but not all of the occasions. She had a positive Phalen's test on every occasion. She had a loss or an abnormal two-point

[4] "It has also been reported that 5% of individuals with [carpal tunnel syndrome] CTS may have normal electrophysiologic studies." AMA Guidelines to the Evaluation of Permanent Impairment, 5th Ed. (2001),"Carpal Tunnel Syndrome", at page 495.

> discrimination specifically restricted to the thumb, index and middle finger with the median nerve distribution, the normal two-point discrimination, the ulnar nerve distribution"

CX 20 at 36.

Dr. Slutsky's office issued a work status report on July 26, 2001, placing Claimant on temporary total disability. CX 16 at 495; CX 19 at 53-4. However, Dr. Slutsky warned against the accuracy of the report because at the time, he did not consider Claimant to have had an industrial-related claim. Dr. Slutsky indicated that he usually just complied with the patient's requests for non-industrial work reports. CX 20 at 54.

Dr. Slutsky performed the carpal tunnel release surgery on July 27, 2001. CSSX 12 at 26-27; LBX 28 at 42. His post operative diagnosis was that Claimant had suffered from carpal tunnel syndrome. *Id*.

Dr. Slutsky's office issued another work status report on September 6, 2001, reflecting that Claimant was able to return to modified duty as of November 3, 2001 limiting Claimant to light use of her left hand, no driving and no lifting of greater than 5lbs. CX 16 at 617; CX 20 at 53-4.

Claimant returned to work full time for a variety of employers on November 3, 2001 in positions she had worked prior to her July 2001 surgery. She continued to work full time in a variety of positions and also earned overtime on occasion from November 3, 2001 through at least September 23, 2002. CX 1 at 49-52.

Dr. Slutsky re-examined Claimant on May 23, 2002. CSSX 12 at 28. Dr. Slutsky diagnosed Claimant as being status post left carpal tunnel syndrome and malunited left distal radius fracture. CX 12 at 30. He further opined that Claimant had reached permanent and stationary status and could return to work with no restrictions. *Id*. at 30-31.

In response to a request by Claimant's counsel, Dr. Slutsky issued a permanent impairment assessment on February 19, 2003 where he assessed permanent partial disability rating of 20% to Claimant for her upper extremity impairment. CX 16 at 609.

Dr. Slutsky was not aware that the American Medical Association ("AMA") Guidelines contain specific guidelines for rating carpal tunnel syndrome and therefore did not rate for carpal tunnel syndrome. CX 20 at 108. He testified that his impairment rating was inappropriate because he made the impairment rating based upon his belief that he would only have expected maybe a 5% decrease in grip strength following a carpal tunnel release operation. TR at 56-57. He concluded that Claimant may have had a distal radius fracture some time previous to the carpal tunnel surgery that was also affecting her grip strength. *Id.*

Dr. London examined Claimant after her operation on December 15, 2003. LBX 7 at 41. Claimant indicated to Dr. London that she still suffered from slight weakness in her left hand, occasional numbness in the left thumb, index and long fingers. LBX 7 at 42. Claimant did not complaint of pain in her left wrist. LBX 7 at 42. It was his opinion "that work activities after

5/19/98 doing driving jobs aggravated the left wrist condition that resulted from the 5/19/98 industrial injury and caused it to worsen, leading to the necessity for the left carpal tunnel release surgery." LBX 7 at 47.

On February 5, 2004, Dr. London reviewed previous X rays and concluded that Claimant had not fractured her left wrist in the May 19, 1998 industrial accident. LBX 7 at 49.

On March 8, 2004 Dr. Peter M. Newton briefly examined Claimant on behalf of employer CSS. LBX 8 at 51. Dr. Newton stated that Claimant had "intermittent dull aching" in her left wrist that was aggravated by cold weather, typing on a keyboard for longer then 20 or 30 minutes or carrying her 24 pound baby in her left arm. LBX 8 at 51. She complained of tingling or numbness in her left hand fingers occurring approximately once a week. LBX 8 at 50. It was his opinion that Claimant had developed all of her carpal tunnel symptoms within three weeks of the May 19, 1998 incident and therefore that the carpal tunnel syndrome was not exacerbated by her post incident work. LBX 8 at 57. He based this opinion on the patient's statements stating in his report recapping the examination that "[w]hen she was specifically asked if there were any specific incidents in 2001 that aggravated her condition, she stated no." LBX 8 at 51. He did not find evidence of a permanent impairment at that time. LBX 8 at 57.

Claimant's work record for September 2, 1998, through July 2001, indicates that she worked for many different longshore employers in a wide variety of traditional longshore positions: UTR driver, dock aloft, UTR signaler, sweeper, lasher, and in a swing job. CX 1 at 1-48; CX 8; CX 9, CX 10; CX 11. Claimant wore a orthopedic brace on her left wrist during this entire time and held swing jobs for a majority of the time. TR at 349-50. During this time, Claimant worked on several occasions for both LB and CSS as well as other employers. CX 1 at 36-48. The last day Claimant worked for LB before her surgery was June 2, 2001. *Id.* at 48. Claimant worked for CSS doing swing work the last three days, from July 23 to July 25, 2001, before her surgery on July 27, 2001. *Id.* at 49; CX 11 at 192.

In describing the specific job duties that Claimant engaged in from September 2, 1998 to July 25, 2001, a UTR is a small-tractor/truck and driving one involves steering and shifting the gears of the truck's manual transmission. TR 57; CX 9 at 97. The shift lever for the truck was on the right hand side of the driver's seat and Claimant used her right hand to shift. TR at 58. This position also involved hooking and unhooking air hoses to the trailer's brakes, as well as some lifting. TR at 58.

The "dock aloft" position involved unlocking the back chassis of large metal containers by turning a lever. TR at 59. It is possible that this sometimes required the use of Claimant's left hand but she testified that she could usually accomplish the job with only her right hand. TR at 60.

A UTR signaler works under a transtainer signaling the trucks below. TR at 62. This job required minimal use of her left hand to grasp the signals. *Id.*

There were two types of sweeper positions. TR at 321. The job of sweeper involved Claimant sweeping with a broom[5], which required her using both her hands or picking up garbage with a clamper or stick, which she could do with only her right hand. TR at 321-22. She estimated that she swept using a broom for 30 minutes of each of her four to five hour shift in this position. TR at 322. The sweeper position also denotes the position of mechanical sweeper, a job that required Claimant to sit in a large mechanical sweeper as a passenger and did not require the use of her left hand. TR at 61.

Lashing involves working with standard and three-high metal bars that are usually about eight feet high weighing about 50 pounds , and are used to secure containers secure to a ship's deck. TR at 44-45; 164-65. Lashing involves attaching these bars to containers and turn buckles on the ship so the containers remain secure when the ship is sailing. *Id*.

On July 23 through July 25, 2001, the last days leading up to her disability due to the July 27, 2001 surgery, Claimant worked for Employer CSS in a swing position. CX 11 at 192. The swing job position required Claimant to "unlock" the containers from the deck or catwalk, to place or remove "cones" on containers, to signal and to occasionally drive a forklift. TR at 63, 331. In order to unlock a container, Claimant used a light aluminum pole in both hands. TR at 63. A cone is a metal object used to lock two containers together. TR at 65. It weighs approximately 7 pounds. TR at 66. Claimant further testified unconvincingly that the placing and removing of cones required minimal use of her left hand. TR at 66. If a cone became stuck, Claimant would have to swing another cone to dislodge it. TR at 65. Also, if the cone had a "pull cord," Claimant would have to "release" the cone by pulling on the cord with her right hand and sometimes supporting the cone with her left hand. TR at 70.

ANALYSIS

The following conclusions of law are based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon the analysis of the entire records, arguments of the parties, and applicable regulations, statutes and case law.

Credibility

In arriving at a decision in this matter, I am entitled to determine the credibility of the witnesses, weigh the evidence, and draw my own inferences from it; furthermore I am not bound to accept the opinion or theory of any particular medical expert. *See Banks v. Chicago Grain Trimmers Assoc., Inc.,* 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968*); Todd v. Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Scott v. Tug Mate, Inc*., 22 BRBS 164, 165 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Avondale Shipyards, Inc. v. Kennel,* 914 F.2d 88, 91 (5th Cir. 1988).

Claimant's testimony is inconsistent and contradicted by other evidence in the record undermines her credibility as to her alleged non-use of her left hand/wrist from September 2,

[5] Counsel for LB had Claimant authenticate a broom at hearing of the type used by Claimant as a sweeper. TR at 321. The broom was a push broom with a head approximately four feet in length and a handle approximately six feet long.

1998 to July 25, 2001. Claimant testified at hearing under oath that from the time she came back to work in September 1998 through the time that she underwent surgery in July 2001, she did not engage in any lashing work. TR at 62-63. Her time records for that same time period, however, show numerous dates (approx. 47 days) when she worked as a lasher for eight hour shifts in addition to overtime. CX 1 at 41-48.

I also rely on Claimant's time records showing her working full time and occasionally earning overtime at a variety of positions that were likely to have aggravated her left wrist condition before her surgery in July 2001. CX 1 at 10-49; LBX 7 at 47. I also rely on demonstrative evidence of the 7 pound cone, the large sweeper broom and, once again, the Claimant's time records showing her working various driving jobs from September 1998 through May 2001, over her own testimony that for the three-year period preceding her July 2001 surgery she worked jobs that allowed her to avoid repetitive gripping with her left hand. *See* CX 1 at 37-48 versus TR at 57-60; 342.

In addition, Claimant's testimony is inconsistent and not credible with respect to the lack of change in her symptoms from September 1998 through July 2001. See TR at 73, 75-76. During an October 7, 1999 exam, Dr. Delman found her first complaining of new symptoms including that her left hand felt cold and that it looked to her to be a different size from her right hand. LBX 28 at 28. In addition, following the October 28, 1999 examination, Dr. Delman referred Claimant to Dr. Mehta who indicated that Claimant told him her symptoms had increased over time and were worse at night. LBX 10 at 73; LBX 28 at 27. Also, in early 2001, Dr. Slutsky performed an EMG and nerve conduction study which revealed "carpal tunnel syndrome of mild severity" in contrast to the earlier tests which were negative for indications of carpal tunnel compression or irritation of the nerve. LBX28 at 38; CX 20 at 49-50. Finally, Dr. London did not believe Claimant to be credible in her grip strength tests as he found there was no muscle atrophy consistent with Claimant's low left grip strength test scores. LBX 7 at 33, 36, and 40.

Accordingly, I reject Claimant's testimony as unreliable and not credible. Because of this, her statements concerning whether or not her symptoms varied from September 2, 1998 to July 25, 2001 cannot be relied upon.

Moreover, having had the opportunity to observe the demeanor of Claimant, Dr. London, and Dr. Newton, and viewing the demonstrative evidence of the 7 pound cone and sweeper broom, I find the testimony of treating physician Dr. Delman and Dr. London, an examining physician with a long history examining Claimant from 1998 to December 2003, more credible on the issue of Claimant's developing or aggravating left wrist condition after returning to work on September 2, 1998. I find credible both Dr. Delman's and Dr. London's testimony and opinions that Claimant's numerous positions subsequent to her May 1998 injury, including swing work, likely aggravated her left wrist condition. TR at 104-105, 118, 273, 287-88; LBX 28 at 81-82, 87-88; and LBX 7 at 47.

Dr. Newton, on the other hand, met Claimant just once for approximately 45 minutes on March 8, 2004 and simply relied almost exclusively on Claimant's statements to him that her symptoms did not change during the three years preceding her July 2001 carpal tunnel release

surgery, and that during that time, she could lift no more than two pounds with her left hand and simply rested her left hand/wrist while working positions not involving use of her left hand like driving a forklift and not lashing. TR at 161-65, 167-68, 194-195. Claimant also told Dr. Newton that her left hand/wrist condition improved 70% with the surgery. TR at 168-69. When Dr. Newton examined Claimant in March 2004, he found her in no pain, having a well-healed scar over her left wrist, good motion of the wrist, normal sensation, normal Tenal and Phalen's tests, and insignificant differences between Claimant's left and right grip strengths. TR at 169-171. Dr. Newton opined that Claimant had excellent results from her carpal tunnel release surgery. *Id.* at 171.

Dr. Newton also opined about the causation of Claimant's carpal tunnel syndrome, relying on Claimant's incomplete statements to arrive at his opinion that Claimant's presurgical symptoms and need for surgery were caused entirely by her May 19, 1998 injury; and there was nothing subsequent to that injury that aggravated her left wrist condition. TR at 176. I reject Dr. Newton's opinion on causation of Claimant's presurgical symptoms and need for surgery as I find they are based on Claimant's inaccurate subjective statements that, as referenced above, are proven to be untrue as to the nature of her work during the three years preceding surgery, her 30% impairment, and her unchanging symptoms. I also reject Dr. Newton's opinion regarding causation of Claimant's need for surgery as it is unsupported by objective medical evidence and established scientific research applicable to the facts of this case. See TR at 73, 75-76; 104-105, 118, 273, 287-88; LBX 10 at 73; LBX 28 at 27-29, 81-82, 87-88; and LBX 7 at 47. Finally, Dr. Newton was unfamiliar with most of the job duties involving sweepers, swingmen, and did not appear knowledgeable about the job duties of lashers or dock-loft workers. TR at 194, 196. As a result, I reject his opinions on the issue of causation of Claimant's presurgical symptoms and need for surgery.

With the foregoing determinations in mind, I turn to the remaining issues in this case.

The Last Responsible Employer Issue

Claimant's Aggravated Injury after September 2, 1998

The parties have identified several issues related to Claimant's injury in 1998 including: 1) whether Claimant's presurgical symptoms and need for surgery in July 2001 was the natural progression of Claimant's May 19, 1998 injury and, therefore LB's liability; 2) whether, instead, Claimant developed carpal tunnel syndrome or aggravated her pre-existing left wrist condition by work she performed from September 2, 1998 through July 25, 2001; and 3) the last responsible employer (see full discussion of this issue below). In essence, the parties raise the above issues because, should I find that Claimant sustained an aggravating injury after returning to work on September 2, 1998, and that the work she performed for the last employer, CSS, on July 23-25, 2001 was likely to have further aggravated her left wrist condition, I would be compelled to conclude that CSS was the last responsible employer

Causality of Carpal Tunnel Syndrome after September 2, 1998 through July 27, 2001

The parties dispute whether Claimant sustained an aggravated injury following her May 19, 1998 injury while employed by LB. Claimant and CSS contend that Claimant sustained an injury to her left wrist while at LB in May 1998 and that the July 27, 2001 carpal tunnel release surgery resulted as the natural progression of her previously injured left wrist from May 1998. LB argues that the progression of Claimant's left wrist condition to the point that surgery was necessary in July 2001 was caused by her employment after September 2, 1998 including her employment at CSS.

To be compensable under the Longshore Act, an injury must arise out of and in the course of employment. Section 20(a) provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. §920(a). To invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he or she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). A claimant is entitled to invoke the presumption if he or she presents at least "*some* evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990). However, when the identity of the last responsible employer is at issue, one employer may not invoke the 20(a) presumption against the other. *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999).

Once again, to establish a *prima facie* case under the Act, claimant must show that she sustained physical harm and that conditions existed at work which could have caused the harm. *Ramey v. Stevedoring Services of America,* 134 F.3d 954, 959 (9th Cir. 1998). In the instant case, Claimant and CSS allege that Claimant's left wrist/hand condition resulted from the May 19, 1998 incident. LB admits that Claimant sustained a left wrist/hand injury in May 1998, but disputes whether her left wrist/hand condition, after she returned to work on September 2, 1998, is the natural progression of her May 1998 injury. I find that Claimant has established a *prima facie* case with respect to her left wrist/hand condition, based on the medical evidence including her consistent complaints of weakness in her left wrist/hand back and leg and treating physician Dr. Slutsky's opinion that Claimant's carpal tunnel syndrome was either caused by Claimant's May 19, 1998 fall[6] or could have been caused by the casting following Claimant's May 19, 1998 injury.[7] CX 20 at 16, 39, 60. Based on the foregoing, I find that Claimant has established a *prima facie* case with respect to her condition and therefore has established a compensable claim under the Act.

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[6] As referenced later in this decision, Dr. Slutsky while concurring that Claimant suffered from carpal tunnel syndrome just prior to her July 27, 2001 surgery, nevertheless also testified that he could express no confident opinion concerning causation of Claimant's carpal tunnel syndrome because three years had transpired from the Claimant's May 1998 fall before he first examined her. CX 20 at 10-11, 16-23.

[7] As referenced in my credibility analysis above, I reject Dr. Newton's opinion regarding causation of Claimant's carpal tunnel syndrome as I found him less candid than Dr. Slutsky concerning his ability to opine about causation years after the fact. Dr. Slutsky's opinions concerning causation, while inconsistent, assist Claimant in satisfying her section 20(a) presumption..

Once the Section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Then, ultimate burden of proof rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994). *See also Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

It is undisputed that Claimant has had left wrist problems following her first injury on May 19, 1998. Claimant's job duties and her medical and employment records indicate that, during her return to work from September 2, 1998 to July 25, 2001, she was working a variety of positions that required her to use her left hand/wrist, that she experienced symptoms associated with her left wrist, these symptoms increased, and that objective medical evidence showed that she developed or aggravated her carpal tunnel syndrome. Additionally, Dr. London testified that to a reasonable degree of medical certainty, Claimant's performance of swing jobs aggravated her left wrist condition. TR at 104-05; *see also* LBX 7 at 47. Most notably, Claimant was last employed by CSS as a "swingman" just prior to her July 27, 2001 carpal tunnel release surgery. CX 1 at 49. Treating physician Dr. Delman agreed that Claimant's continued work activities, subsequent to September 2, 1998, aggravated the pre-existing condition in her left wrist and hand, accelerating the need for surgery. LBX 28 at 81-82, 87-88. Based on this evidence, LB has successfully rebutted the 20(a) presumption. Because this evidence is properly analyzed under the framework of the last employer rule, I weigh the evidence on this issue in the subsequent section.

Last Responsible Employer Between LB and CSS

Liability is not apportioned in successive or cumulative injury and occupational disease cases under the LHWCA. The last employer is generally held liable for all compensation due an injured worker, even though his work for prior employers contributed to the disability. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1284-85 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). Under the so called "last responsible employer" rule, it is first necessary to classify the medical condition as an occupational disease or an injury because liability attaches at different times for each. A cumulative injury gradually developing over a long period of employment may be classified as an accident. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 199l*); Steed v. Container Stevedoring Co.*, 25 BRBS 210, 219 (1991); *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984).

The severity of Claimant's wrist injury suddenly increased following her work accident on May 19, 1998. TR at 19. Claimant first complained of carpal tunnel type symptoms when she had the splint removed by Dr. Delman on May 29, 1998 and there is no evidence in the record to suggest that Claimant's wrist condition existed prior to the May 19, 1998 accident. CX 15 at 418. I find therefore that Claimant's condition should be treated as an injury and not an occupational disease and therefore I will apply the aggravation or two-injury branch of the last responsible employer doctrine.

The aggravation or two-injury rule is:

> If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.

Foundation Constructors v. Director, OWCP, 950 F.2d 621, 624 (9th Cir. 199l), *quoting Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986); *see also Steed v. Container Stevedoring Co.,* 25 BRBS 210, 219-20 (1991) ("[T]he responsible employer is the employer for whom claimant worked at the time of the injury (i.e. the last aggravation), regardless of the claimant's date of awareness."); *Pittman v. Jeffboat, Inc.,* 18 BRBS 212, 215 (1986).

The present case involves an aggravation of an earlier injury resulting in a subsequent injury. *See* TR at 104-05, 118, 273, 287-88; LBX 28 at 81-82, 87-88; LBX 7 at 47. The last aggravation occurred on the last day worked under the potentially injurious conditions. *Steed,* 25 BRBS at 220. *See also Thorud v. Brady Hamilton Stevedore Co.*, 18 BRBS 232, 234 (1986).

The section 20(a) presumption does not aid the employer trying to shift liability to a later covered employer. *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62, 65 (1992). In *Buchanan v. International Transportation Services,* 31 BRBS 81(1997), the Board held that an employer "may be relieved of liability for disability and/or medical benefits in a two-injury case by establishing that a subsequent work-related injury aggravated the employee's condition….A determination as to which employer is liable requires that the administrative law judge weigh the evidence." *Id* at 84.

It is important to acknowledge and briefly discuss the recent Ninth Circuit decision of *Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co.* 339 F.3d 1102, 1105 (9th Cir. 2003)(hereinafter "Price"). I agree with Employer CSS that *Price* does not modify prior case law requiring substantial evidence of an aggravation of the earlier injury through work related activities such that liability would not shift to a later employer if the injury would have naturally progressed to needing surgery even absent the aggravation. *See generally Id.* However, *Price* does stand for the proposition that substantial evidence showing even a *marginal* aggravation or acceleration of the earlier injury can and will be enough to pass liability onto the subsequent employer. *Id*.

In *Price*, ALJ Paul Mapes relied on:

> a doctors' testimony that there was a gradual loss of knee bone and cartilage each additional day Price worked. Since Price was still able to do his job to some extent the day before the surgery, he had

> not progressed to the point of maximum disability, i.e., total inability to use his legs. There was gradual wearing away of the bone even on the last day before surgery, so his employment with Metropolitan caused a marginal increase in the need for surgery. ALJ Mapes concluded that Metropolitan was the 'last responsible employer' and was liable to Price under the LHWCA even though Price had worked for Metropolitan only one day.

Price 339 F.3d at 1105.

Claimant returned to work on September 2, 1998. She complained of symptoms that indicate that her work activities from that point forward irritated or aggravated her condition. For example, Claimant stated "if I used my hand very much then it would flare up. I would have more symptoms." TR at 341. Claimant met with Dr. London on June 4, 1998 but did not complain of any numbness in her ring finger or that her left hand had changed colors or looked to be a different size from her right. TR at 84. Claimant first complained, however, of these new symptoms months after the accident. TR at 329-30. In his September 29, 1998 report Dr. London stated that Claimant complained that the numbness and weakness in her left hand had increased since she returned to work. LBX 7 at 30; TR at 270.

The parties ultimately disagree on whether these variations in symptomology were a worsening of the underlying condition or merely temporary flare ups. LB's position that there was at least a minimal increase in Claimant's condition to necessitate carpal tunnel release surgery was supported by the testimony and reports of Drs. Delman, London and Slutsky, Claimant's work records as to the type of activities that would tend to aggravate the underlying condition, and whether Claimant did in fact aggravate her carpal tunnel syndrome.

Dr. Delman indicated in his deposition that lifting, gripping, grasping, keyboard work, awkward positioning of the body or repeating a certain motion could aggravate symptoms of carpal tunnel syndrome. LBX 28 at 30. He also stated that "[i]t is certainly likely that her ongoing activities at work would aggravate the symptoms as she returned to work for some time before the surgery was performed and activities of this nature, including lifting, gripping, grasping and frequent driving, can exacerbate carpal tunnel symptoms." LBX 28 at 77.

In Dr. Delman's opinion, the job of signaling could aggravate Claimant's underlying condition but was less likely to do so then some other jobs. LBX 28 at 30. He stated that driving a forklift, sweeping, and tending to cones as in swing work all were activities that could aggravate carpal tunnel syndrome. LBX 28 at 31. Dr. Delman opined during his deposition that "those activities, from what I can see of the records I've reviewed, did aggravate the symptoms in her wrist." CX 19 at 49.

Dr. London stated that although "there would be a natural progression in almost all cases (of carpal tunnel syndrome)…given that natural tendency to progress, *activity will tend to aggravate it*." TR at 278 (emphasis added). He further opined that to a reasonable medical certainty Claimant's performance of swing jobs did in fact aggravate and may have accelerated Claimant's carpal tunnel syndrome in her left wrist and her need for surgery. TR at 104-105;

LBX 7 at 47. Dr. London based his opinions on her activities on returning to work in September 1998, including her positions as a driver and swing person once he was made aware of the job duties of each position.[8] *Id*.; *See also* LBX 7 at 47.

Dr. Slutsky described what he believed were physical activities that would normally contribute to carpal tunnel syndrome. CX 20 at 41.

> I would look for a pattern of repetitive gripping and pinching with her left hand such as an assembly line job, working in a position requiring repetitive wrist flexion in unphysiological positions…Bending (the wrist) forward. It tends to increase the pressure of the carpal canal. Working with vibratory tools on a repetitive basis such as pneumatic tools, a jackhammer such as aircraft mechanics. Those are significant findings.

CX 20 at 41.

Dr. Slutsky also indicated that driving a forklift or UTR could contribute to carpal tunnel syndrome due to the repeated gripping of the steering wheel and the vibration. CX 20 at 42. He stated that repeated vibration was a "mechanism of nerve injury" and can injure the nerve in the same way as repetitive blunt trauma. CX 29 at 43. Though Claimant denied performing lashing work after September 2, 1998 but prior to her surgery on July 27, 2001, her work records show that Claimant frequently performed lashing tasks involving the repetitive lifting of metal bars each weighing 50 pounds. TR at 44-45; 164-65; CX 1 at 41-48.

Employer CSS contends that the new symptoms do not reveal a worsening of the underlying condition but were merely temporarily flare-ups. Their position is supported primarily by the rejected testimonies of Dr. Newton and Claimant.

However according to Claimant's own testimony, between September 2, 1998 and the July 27, 2001 surgery, Claimant worked in many positions that would have required at least some use of her left hand and often times would have involved gripping, repetitive motion or exposure to vibrations. *Id.* As stated above, I did not find Claimant to be a credible witness with respect to her statements that she did not use her left hand at work from September 1998 until her surgery on July 27, 2001. At hearing, Claimant struggled to lift just one seven pound cone with her right hand. I find it highly improbable that Claimant could perform swing job duties without using her left wrist/hand to repeatedly place or remove cones on containers. Her testimony was not believable in light of this, the required job duties of the swing position involving the frequent handling of cones, and the requirement of left hand usage to be a lasher, drive a UTR and signal as referenced hereafter.

[8] While it is acknowledged that Dr. London's opinions concerning the nature and extent of Claimant's left wrist/hand condition changed from his examination on February 16, 2000 to his next examination on December 15, 2003, Claimant was not disclosing the full extent of her work activities from September 2, 1998 through July 25, 2001 to Dr. London who initially understood that Claimant was performing driving work during this period when he drafted his January 2004 report. See LBX 7 at 41-48. When Dr. London testified at trial he was further informed that Claimant had also performed swing jobs during this period and he adjusted his opinions further to take into consideration the true facts of Claimant's work history.

Claimant worked as an UTR driver and repeatedly used her left hand to perform lifting and gripping activities. TR at 57-58. A UTR is a large truck with a fifth wheel. TR at 57. Claimant drove the truck. TR at 57. She testified that she used her right hand to shift gears. *Id.* She probably would have had to grip the steering wheel with her left hand when she used her right hand to shift gears. She also stated that she performed "lifting and loading the fifth wheel," activities which I find are difficult to do one handed. TR at 58.

Claimant worked in a position described as "dock aloft." TR at 59. This job consisted of unlocking chassis. *Id.* She testified that this was normally a one handed operation, but stated that there were times when it could require both hands. TR at 60. She also testified that occasionally the lock on the chassis would become stuck and she would have to dislodge it by hitting it with something. TR at 317. She usually kept a cone in the back of the truck for this purpose and testified that she only needed one hand to swing the cone. TR at 317. At trial, Claimant was barely able to handle a cone with only her right hand, and I find she would probably have struggled trying to swing the cone at a stuck lock using only her right hand. She was struggling at hearing to simply maneuver the cone when she went through the motions required for the swing position. TR at 319; *see infra* p. 11.

Claimant worked in a position described as a "UTR signal" job. TR at 62. This job required Claimant to stand and signal to trucks, requiring repetitious use of her left hand to grip the signal. *Id*.

Claimant also worked in a position referred to as a "swing" job. CX 11 at 192. Although Claimant does not specifically remember what she did for CSS on the last final three days prior to her July 27, 2001 surgery, her time card reveals that she worked eight hour shifts in the swing position. CX 11 at 192; TR at 345-46.

As part of the swing job Claimant was responsible for either unlocking chassis that were secured to the deck or catwalk, placing or removing cones used to secure the containers and/or signaling activities. TR at 63. Although Claimant implausibly testified that she was able to avoid using her left hand during swing work, she later testified that the duties sometimes required the left hand. She had to use her left hand to hold or brace the light aluminum pole used to unlock the containers. Compare TR at 58-70; TR at 315-318 with TR at 63. She had to use her left hand to control the crow bar and/or cone she used to knock the stuck chassis loose. TR at 346. When she was responsible for removing seven pound cones with pull cords, she remarkably testified that this was primarily a one handed operation, but would sometimes use her left hand to brace the cone to keep it from falling. TR at 65-66. When she demonstrated to the court at trial how she would unlock a locked chassis one handed, watching Claimant struggle, I was not convinced that the operation was primarily a one handed operation as she struggled. TR at 319-320. The swing job also sometimes involved signaling - which Claimant admitted required the use of her left hand - and driving a forklift which requires both hands. TR at 62-63, 331.

Dr. Newton testified that one with carpal tunnel syndrome can aggravate it at a later date. TR at 238. Yet Dr. Newton also stated that Claimant's need for wrist surgery was not aggravated by Claimant's employment activities after September 1, 1998, and that the May 19, 1998 accident "caused all of (Claimant's) problems." TR at 175. He stated in his March 8, 2004

report that "[a]ccording to the claimant her left wrist and hand never improved from the initial injury of May 1997 and *gradually worsened on its own."* LBX8 at 51 (emphasis added). In the same paragraph he stated that "[a]ccording to Ms. O'Neill her left hand condition *remained constant ever since her injury of 1997*." LBX8 at 51 (emphasis added). Although counsel for CSS attempted to argue that the two statements were not necessarily inconsistent I am unconvinced especially considering the lackluster effort put forth by Dr. Newman elsewhere in his report. Dr. Newton ignored Dr. Delman's medical report noting that Claimant was suffering from new symptoms, and misquoted Dr. Slutsky's report when he noted that Dr. Slutsky felt Claimant's condition was caused by the work injury of May 21, 1998. TR at 207, 220. Additionally, Dr. Newman examined Claimant only once for 45 minutes, which is far less time then Drs. London, Delman and Slutsky spent with her. TR at 166. I have also rejected Dr. Newman's opinions on the causation issue of Claimant's left wrist/hand condition because I did not find him to be a very credible witness at the hearing having relied almost exclusively on Claimant's incomplete and questionable statements without exploring the actual work that she performed from September 1998 to her last day at work on July 25, 2001. See TR at 232-33.

I have weighed the evidence and I find that Drs. Delman, London and Slutsky are more credible concerning the aggravation issue than either Claimant or Dr. Newton. I find that substantial evidence supports a finding that, between September 2, 1998 and July 27, 2001, Claimant performed many job activities that caused at least a marginal increase in her need for carpal tunnel release surgery. Claimant's symptoms increased in October 1999 after she began more frequent work as a lasher starting in July 1999. There is no definitive evidence that shows that Claimant developed her carpal tunnel syndrome prior to her return to work on September 2, 1998. There is substantial evidence, however, that shows that by October 1999 or, at the latest, February 2001, as reflected in the objective test results from her third EMG, Claimant had developed carpal tunnel syndrome. More specifically, I find that the swing job performed by Claimant for CSS from July 23, 2001 to July 25, 2001, exposed Claimant to injurious conditions and likely aggravated her left wrist condition.

Accordingly, I find that Employer CSS is responsible for all disability and medical expenses/benefits from July 26, 2001 forward to May 23, 2002 as explained below.

Date of MMI and Claimant's Entitlement to Permanent Partial Disability

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement (MMI) or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649 (5th Cir. 1968; *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of MMI is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Willaims v. General Dynamics Corp*., 10 BRBS 915 (1979); *Bellesteros v. Willaimette Western Corp*., 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc., 19 BRBS 243 (1986); Trask v. Lockheed Shipbuilding and Construction Co*., 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not reached the

point of MMI. *Brown v. Bethlehem Steel Corp*., 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker in undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n.*, 27 BRBS 192, 200 (1993).

Claimant's counsel alleges that Claimant deserves a permanent partial disability rating of 20% while Employers contend Claimant has no ratable permanent impairment. A claimant's disability is permanent in nature if he has any residual disability after reaching MMI. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). Any disability before reaching MMI would thus be temporary in nature. An employee reaches MMI when his condition becomes stabilized. *Cherry v. Newport News Shipbldg. & Dry Dock Co*., 8 BRBS 857 (1978); *Thompson v. Quinton Enter., Ltd.,* 14 BRBS 395 (1981).

The burden of proving disability rests with the claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Disability requires a causal connection between a worker's physical injury and his inability to obtain work. If the claimant shows he cannot return to his prior job, it is the employer's burden to show that suitable alternate employment exists which she can perform. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Claimant's post trial brief alleges that Claimant deserves a permanent partial disability rating of 20% and that Claimant did not reach MMI until May 23, 2002. *See* Claimant's Post-Hearing Brief. On November 2, 2001, Claimant returned to gainful employment in the same capacity as she held prior to the July 2001 surgery and is not seeking any temporary partial disability for the time period between November 2, 2001 and the proposed MMI date of May 23, 2002. *Id.* Claimant contends that the MMI date and permanent partial disability claim are adequately supported by Dr. Slutsky's June 4, 2002 permanent and stationary report. CSX 12 at 30.

Following the surgery, Dr. Slutsky saw Claimant on July 31, 2001, August 7, 2001, September 6, 2001, November 15, 2001 and May 23, 2002. CX 16 at 610. On September 6, 2001, Claimant complained of less tingling of her fingers and showed normal results on the two point discrimination testing. CX 16 at 611. During the November 15, 2001 examination, Claimant complained of a two week history of recurrent tingling of her left index, middle and ring fingers and testing revealed she had positive Tinsels and Phalens results. At the May 23, 2002 examination Claimant indicated that there was no pain in her left wrist, but that she still suffered from sporadic numbness and tingling of her fingers following repetitive gripping, occurring approximately once every two weeks. Dr. Slutsky found Claimant was permanent and stationary as of this examination. CSX 12 at 30. Dr. Delman testified that it can definitely take

that amount of time for someone to recover fully from carpal tunnel release surgery. CX 19 at 44.

Dr. London rated Claimant's disability according to the most recent fifth edition of the AMA Guidelines and applied the ratings for carpal tunnel syndrome. TR at 114. He found Claimant's post operation symptoms warranted no permanent partial disability rating or 0%. TR at 114. Dr. London indicated that the only impairments that can be rated for carpal tunnel syndrome and release surgery are sensory loss and motor weakness. TR at 114. Dr. London testified that the 5th edition of the AMA Guidelines provides no impairment rating if a Claimant has normal sensibility two-point discrimination, opposition strength and nerve conduction studies. TR at 116.

Dr. London studied Dr. Slutsky's post operative report and found normal sensibility and opposition strength measurements stating that "the only muscle that goes to distal to the wrist is the opponent muscle at the thumb. No one has found any weakness in that muscle…[a]nd no one has found any EMG abnormalities in that muscle." Dr. London testified that the AMA Guidelines do not consider grip strength a ratable disability following carpal tunnel release syndrome. TR at 117; *see also* AMA Guidelines to the Evaluation of Permanent Impairment, 5th Ed. (2001), at page 495.

Dr. London testified that the sensory loss had returned to normal according to Dr. Slutsky's examinations. TR at 114. He described the two point discrimination test that Dr. Slutsky performed:

> The skin is touched at two points simultaneously by a somewhat sharp object and what you're measuring is the point at which the patient now can distinguish when those two points are two separate points instead of one. Two point discrimination… When the test is normal, it's objective because you can't fake it. When the test is abnormal or averrent, where you're getting widely different results, then it can be subjective or objective. If its wildly averrent, it would be totally subjective, but if someone had a 10 centimeter loss, that would be difficult to explain, but it's objective if you're able to discriminate two points at one to two millimeter ranges which is what she did.

TR at 115.

Dr. London testified that Dr. Slusky was able to find normal two-discrimination on multiple occasions. TR at 116.

Dr. Slutsky testified that he initially rated Claimants disability at 20% by applying the AMA Guidelines for impaired grip strength, motion loss and sensitivity loss. CX 20 at 81. Claimant points to language in the AMA Guide that allows a doctor to rate grip loss if the examiner believes that the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the guides. *See* Claimant's Post Hearing Brief at 19; AMA Guidelines to the Evaluation of Permanent Impairment, 5th Ed. (2001) at page 508.

However at the time Dr. Slutsky made his impairment rating of 20% he was not aware that the 5th edition of the AMA Guidelines had a section on carpal tunnel syndrome and therefore did not even consider that section. CX 20 at 84-86, 108. Dr. Slutsky admitted that he does not do ratings very frequently or customarily in his practice and that he had perhaps done five ratings in his career. CX 20 at 80. At his deposition, he refused to provide a subjective impairment rating based on his own experience and refused to testify regarding the propriety of the ratings as they are set out by the 5th edition of the AMA Guidelines for carpal tunnel syndrome. CX 20 at 81-82, 86. As a result, I give no weight to Dr. Slutsky's initial 20% impairment rating.

Dr. Delman had no definitive opinion concerning Claimant's alleged permanent disability. CX 19 at 47-48; LBX 28 at 47-48.

When Dr. Newton examined Claimant in March 2004, he also found that Claimant's sensation was normal. TR at 173. He opined that pain, grip strength and decreased motion from excess scar tissue were ratable impairments following carpal tunnel decompression surgery. TR at 174. When Dr. Newton examined Claimant in March 2004, he found her in no pain , having a well-healed scar over her left wrist, good motion of the wrist, normal sensation, normal Tenal and Phalen's tests, and insignificant differences between Claimant's left and right grip strengths. TR at 169-171. Dr. Newton opined that Claimant had excellent results from her carpal tunnel release surgery. *Id.* at 171. Dr. Newton's March 8, 2004 report states "[t]here is no evidence of permanent impairment" and he did not find that Claimant suffered from decreased motion or suffered from any pain. TR at 172; CSSX 8 at 57.

After weighing the evidence and relying on the opinions of Dr. Slutsky and Dr. Delman, I find that Claimant was permanent and stationary and had reached maximum medical improvement as of May 23, 2002 with no work restrictions. *See* CSX 12 at 30; CX 19 at 44. After further weighing the medical evidence and above testimony from the doctors, I find Dr. London's and Dr. Newton's opinions consistent and most reliable that Claimant does not suffer from permanent partial disability in connection to her left wrist/hand as of her return to her regular work on November 3, 2001. *See Geisler v. Continental Grain Co.,* 20 BRBS 35, 37 (1987) (failing to award a Claimant for an injury constituting a zero percent impairment under the American Medical Association guidelines). Claimant's ability to return to her regular positions as of November 3, 2001 is further evidence of her not suffering any permanent partial disability as to her left wrist/hand.

Compensation

For total disability, whether temporary or permanent, Claimant is entitled to compensation at the rate of 66 2/3 percent of her average weekly wage. 33 U.S.C. § 908(a)-(b). At trial, the parties stipulated that Claimant's average weekly wage was $1,205.75 as of her May 19, 1998 injury and $1,330.04 as of July 25, 2001. TR at 20-21. As these stipulations have been accepted, and pursuant to Section 6 of the Act, I find Claimant is entitled to compensation from LB for temporary total disability at the compensation rate of $803.34 per week for the period of May 20, 1998 to September 1, 1998 when Claimant returned to her regular work. She is also entitled to compensation from CSS for temporary total disability at the compensation rate of

$886.69 per week for the period of July 26, 2001 to November 2, 2001 when Claimant returned to modified work. From November 3, 2001 to May 23, 2002 when Claimant reached MMI with no work restrictions, Claimant is entitled to compensation from CSS for temporary partial disability at the compensation rate of $886.69 per week offset by the actual weekly wages she earned during that period.

Payment of Medical Expenses for Drs. Slutsky and Farran

It is the duty of the employer to furnish appropriate medical care (as defined in 20 C.F.R. § 702.401(a)) for the employee's injury, and for such period as the nature of the injury or the process of recovery may require. 20 C.F.R. § 702.402; *see also* 50 F.R. 402, Jan. 3, 1985. If the employer refuses to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. *Pirozzi v. Todd Shipyards Corp*., 21 BRBS 294 (1988). Claimant needs only to establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. *Rieche v. Tracor Marine Inc*., 16 BRBS 272, 275 (1984); *Beynum v. Washington Metropolitan Area Transit Authority,* 14 BRBS 956, 958 (1982).

Dr. London opined that Claimant was fully recovered from her May 19, 1998 injury with no residuals as of February 16, 2000. LBX 7 at 40. In contrast, Dr. Delman's October 18, 2000 permanent and stationary report recommended future medical treatment for residual complaints stemming from the wrist injury "including repeat imaging studies or neurodiagnostic testings" as well as a recommendation that Claimant be "permitted orthopaedic re-evaluation with appropriate treatment as determined by that evaluation or the results of subsequent studies." CX 15 at 384; CX 19 at 63. Dr. Delman testified that it would have been reasonable for Claimant to seek consultation with a hand specialist even after having been assessed as permanent and stationary in his October 18, 2000 report and as part of his recommendation that she be permitted orthopedic re-evaluation. *Id.*

I find that given Claimant's new work activities from September 2, 1998 through July 25, 2001 including the addition of lashing to her job duties in July 1999, Dr. London's opinion that Claimant was fully recovered from her May 19, 1998 injury with no residuals as of February 16, 2000 is more credible than Dr. Delman's ongoing connection of Claimant's wrist/hand condition in October 2000 to her May 19, 1998 injury. I find it more likely than not that Claimant developed or aggravated her wrist condition as a result of her frequent repetitive work duties sometime after September 2, 1998. As a result, LB's liability for all of Claimant's necessary medical expenses begins on May 19, 1998 and ends on February 16, 2000.

Dr. London testified that there was evidence of carpal tunnel syndrome when Dr. Slutsky performed the surgery and that the surgery was successful in that it improved her symptoms. TR at 112. Specifically, Dr. London testified that "the two-point discrimination test that Dr. Slutsky had done before and then again after the surgery was now normal. She was able to go back to regular duty. So, her function had increased. Her symptoms had decreased, and one of the tests for sensation that he did before and after the surgery had improved." TR at 112-113.

I find that Claimant has not shown that Dr. Ronald Farran's treatment was an expense liability to either LB or CSS. I find that Claimant has shown that the treatment and surgery by Dr. Slutsky was necessary to treat her Carpal Tunnel Syndrome but that liability for Dr. Slutsky's services only attaches to CSS for services provided from July 26, 2001 to May 23, 2002.

In sum, I find that LB is liable for all necessary medical care relating to Claimant's left wrist from May 19, 1998 through February 16, 2000. I further find that CSS is liable for all necessary medical care relating to Claimant's left wrist, occurring on or after July 23, 2001 through May 23, 2002 when she reached MMI with no work restrictions.

Interest should be awarded on all past due medical benefits, whether costs were initially borne by the claimant or medical providers. *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 76 (1997) *adopting Hunt v. Director, OWCP,* 999 F.2d 419 (9th Cir. 1993), 27 BRBS 84(CRT) (1993).

CONCLUSION

Claimant suffered a compensable left wrist/hand injury from May 19, 1998 to February 16, 2000. Long Beach Container Terminal is liable for all medical care and workers' compensation during this time period. Claimant's left wrist injury was aggravated after she returned to work on September 2, 1998. Since there is no definitive medical evidence that shows that Claimant suffered from carpal tunnel syndrome before returning to work on September 2, 1998, I find that Claimant either developed carpal tunnel syndrome or aggravated it as a result of work performed after September 2, 1998 and that her left wrist/hand condition was further aggravated by work she performed at CSS from July 23 to July 25, 2001. Therefore the last responsible employer rule dictates that liability for medical care and workers' compensation falls upon Employer Centennial Stevedoring Services as the last responsible maritime employer, for all medical care and workers compensation related to the left wrist condition from July 26, 2001 to May 23, 2002.

The carpal tunnel release surgery furnished and recommended by Dr. Slutsky was necessary for the care of Claimant's left wrist injury.

Claimant admits that her second period of disability was from July 26, 2001 to November 2, 2001, when she was out of work for surgery and post-surgery recovery. Claimant returned to work on November 3, 2001, she no longer suffered from a temporary total disability related to her left wrist surgery or injury but is entitled to temporary partial disability from November 3, 2001 to May 23, 2002 when she reached MMI with no work restrictions. As a result, Claimant is not entitled to an award for permanent partial disability from Employer Centennial Stevedoring Services.

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer Long Beach Container Terminal shall pay Claimant temporary total disability compensation of $803.34 per week from May 20, 1998 to September 1, 1998.

2. Employer Long Beach Container Terminal is entitled to a credit for any compensation previously paid to Claimant.

3. Employer Long Beach Container Terminal shall provide such medical treatment as the nature of Claimant's work-related disability shall require and as described in the decision above from May 19, 1998 to February 16, 2000.

4. Employer Centennial Stevedoring Services shall pay Claimant temporary total disability compensation of $886.69 per week from July 26, 2001 to November 2, 2001.

5. Employer Centennial Stevedoring Services shall pay Claimant temporary partial disability compensation of $886.69 per week from November 3, 2001 to May 23, 2002 reduced by Claimant's actual wages during that same time period.

6. Employer Centennial Stevedoring Services shall provide such medical treatment as the nature of Claimant's work-related disability shall require and as described in the decision above from July 26, 2001 to May 23, 2002.

7. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

8. The District Director shall make all calculations necessary to carry out this Order.

9. Counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for Long Beach Container Terminal and Centennial Stevedoring Services within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, counsel for Long Beach Container Terminal and Centennial Stevedoring Services shall initiate a verbal discussion with counsel for the claimant in an effort to amicably resolve any dispute concerning the amounts requested. If the three counsel thereby agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, counsel for the claimant shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the counsel for Long Beach Container Terminal and Centennial Stevedoring Services with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the counsel for the Long Beach Container Terminal and International Transportation Services and shall set forth therein the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for Long Beach

Container Terminal and Centennial Stevedoring Services shall each file a Statement of Final Objections and serve a copy on counsel for the claimant. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. **Because this decision requires Centennial Stevedoring Services to pay most of the benefits owed to the Claimant, it has been determined that Centennial Stevedoring Services should pay three-quarters of the Claimant's reasonable attorney's fees and that only the remaining one-quarter of the attorney's fees should be paid by Long Beach Container Terminal.**

IT IS SO ORDERED.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California